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States - Sovereign Immunity - United States Supreme Court Refuses to Strip States of Their Sovereign Immunity in State Court

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STATES—SOVEREIGN IMMUNITY—UNITED STATES SUPREME COURT REFUSES TO STRIP STATES OF THEIR SOVEREIGN IMMUNITY IN STATE COURT

Alden v. Maine, 527 U.S. 706 (1999)

I. FACTS

Probation officers employed by the state of Maine filed suit against Maine in the United States District Court in 1992.[1] The suit was based upon the Fair Labor Standards Act (FLSA) of 1938, which was passed pursuant to Congress's Article I power.[2] The probation officers claimed the state of Maine had violated this act and accordingly sought redress.[3]

The federal court suit was dismissed[4] when the United States Supreme Court decided in *Seminole Tribe of Florida v. Florida*[5] that Congress does not have the power within Article I of the Constitution to abrogate the sovereign immunity of the states in federal court even to enforce a federal cause of action.[6]

The petitioner filed a new suit, identical to the old one, but in state court.[7] The state trial court dismissed this new case, finding that Maine's sovereign immunity protected the state from suit in state court.[8] Maine's Supreme Court affirmed the state trial court's decision.[9] However, the Maine Supreme Court decision conflicted with an Arkansas Supreme Court decision,[10] which concluded that states are not immune from federal causes of actions in state courts based on Congress's Article 1 power.[11] This diversity of opinion, and the uncertain applicability of the FLSA, prompted the United States Supreme Court to grant certiorari.[12] Additionally, the federal government intervened in the case as a petitioner to defend the statute.[13] The Court concluded that the petitioner had

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1. *See* Alden v. Maine, 527 U.S. 706, 711 (1999).
2. *See id.* at 711-12.
3. *See id.*
4. *See* Mills v. Maine, 118 F.3d 37 (1st Cir. 1997) (stating the initial claim). The federal district court's dismissal of the petitioners' action was affirmed by the First Circuit Court of Appeals. *See Alden*, 527 U.S. at 712.
5. 517 U.S. 44 (1996).
6. *See Alden*, 527 U.S. at 712 (citing Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)).
7. *See id.*
8. *See id.*
9. *See id.* The Maine trial court dismissed the suit and the Maine Supreme Judicial Court affirmed. *See id.*
10. *See generally* Jacoby v. Arkansas Dep't of Educ., 962 S.W.2d 773 (Ark. 1998), *vacated*, 527 U.S. 1031 (1999).
11. *See generally id.* at 775.
12. *See* Alden v. Maine, 527 U.S. 706, 712 (1999) (citing Alden v. Maine, 525 U.S. 981 (1998) (granting certiorari)).
13. *See id.*

no actionable federal claim, and thus affirmed the judgment of the courts of Maine.[14]

The Court *held* that Article I of the United States Constitution does not vest Congress with the power to remove a state's immunity from private suits in state courthouses without the state's consent.[15] Furthermore, the State of Maine had not consented to suits for overtime pay and liquidated damages under the FLSA.[16]

II. LEGAL BACKGROUND

The Supreme Court of the United States has been overruled by constitutional amendment just four times in our nation's history.[17] The first time was when the Eleventh Amendment effectively overruled *Chisholm v. Georgia*.[18] That Amendment would come to be the cornerstone of the modern doctrine of sovereign immunity.[19] It is crucial to understand the Eleventh Amendment in order to understand the present theory of sovereign immunity, but it is also crucial to understand what the Amendment changed, the context within which that change occurred, and what the Amendment has come to represent.[20]

The *Chisholm* decision was based upon the Court's understanding of Article III of the Constitution, which contains the bases for federal subject matter jurisdiction.[21] Article III must be the starting point.

A. ARTICLE III

Article III was drafted by a special committee, which was asked by the Constitutional Convention to describe what the federal court's role would be.[22] Authorization for "state-citizen"[23] diversity suits was specifically included in the draft.[24] This draft was ratified by the

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14. *See id.*

15. *See id.*

16. *See id.*

17. *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895 (1983).

18. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 437 (1793) (holding that a state had no immunity from suit in federal court when the petitioner was a citizen of another state); *see also* U.S. CONST. amend. XI.

19. *See* Alden v. Maine, 527 U.S. 706, 712-13 (1999).

20. *See* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1045 (1983) (illustrating the evolution of the 11th Amendment, from what some argue was a narrow reaction to *Chisholm*, to a broad reinterpretation of the first principles of federalism).

21. *See id.*

22. *See id.* at 1045-46.

23. *See id.* at 1046. Fletcher coined the phrase "state-citizen." *See id.*

24. *See* Nevada v. Hall, 440 U.S. 410, 434 (1978) (specifying the inclusion of a neutral forum for the settlement of disputes between states and citizens of different states). Interestingly, the

convention with "apparently no discussion of the 'state-citizen' diversity clause . . . and in virtually the same form as it was drafted by the Committee of Detail."[25]

Article III was written to respond to the needs of a national government in areas where the Articles of Confederation had failed.[26] One of the great weaknesses of the Articles of Confederation was its national court system.[27] The Confederation's courts were basically limited to forming courts to solve conflicts arising on the oceans and to resolve land disputes between states.[28] With only these exceptions, the vast majority of the cases were to be heard in the state courts.[29]

Thus, Article III was meant partly to correct the problem of biased courts charged with resolving conflicts between the states or citizens of different states.[30] The Article corrected this problem by providing for the settlement of such conflicts in neutral forums, that is to say, in federal, rather than, state courts.[31]

However, this motivation was tempered by the concern of many that by granting federal power to resolve conflicts among the states, each individual state's sovereignty would be diminished.[32] When the Constitution's ratification was being debated, this concern was voiced forcefully.[33] In Virginia, for example, George Mason argued that it was a disgrace for the "state to be brought to the bar of justice like a delinquent individual."[34] He questioned: "Is the sovereignty of the state to be arraigned like a culprit, or private offender?"[35] Mason openly worried about the possible ramifications of such lawsuits, and he observed that it would be ridiculous to attempt to place the state in custody.[36] He concluded that "[a] power which cannot be executed ought not to be granted."[37]

Though Edmund Randolph, James Wilson and others argued that such an abrogation of the States' sovereign immunity was indeed

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authorization was included in a margin note in the handwriting of someone other than the principal author. *See* Fletcher, *supra* note 20, at 1046.

25. Fletcher, *supra* note 20, at 1046.

26. *See Hall*, 440 U.S. at 434.

27. *See id.*

28. *See id.*

29. *See id.* at 434 n.2 (citing C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 9 (1972); J. Goebel, *Antecedents and Beginnings to 1801*, *in* HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1971)).

30. *See id.* at 434.

31. *See id.*

32. *See id.* at 435.

33. *See* Fletcher, *supra* note 20, at 1047.

34. Fletcher, *supra* note 20, at 1049 n.67 (citing 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526-27 (J. Elliot ed., 1881) [hereinafter DEBATES]).

35. Fletcher, *supra* note 20, at 1049 n.67 (citing DEBATES, *supra* note 34).

36. *See* Fletcher, *supra* note 20, at 1049 n.67 (citing DEBATES, *supra* note 34).

37. Fletcher, *supra* note 20, at 1049 n.67.

necessary for the new national government to succeed where the Articles had failed, others defended both the proposed Constitution and the traditional attributes of state sovereignty.[38] Both James Madison and John Marshall argued that though the federal court would have jurisdiction over a state if the state chose to prosecute a civil lawsuit against another state or an individual, no individual could call the state into court as a defendant.[39]

Likewise, Alexander Hamilton in the *Federalist No. 81* urged:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.[40]

As the Supreme Court noted in *Nevada v. Hall*,[41] "this Court has consistently taken the views of Madison, Marshall, and Hamilton as capturing the true intent of the Framers."[42] Thus, it may be said that the Framers believed that the states possessed sovereign immunity at the time of Article III's ratification.[43]

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38. *See* Nevada v. Hall, 440 U.S. 410, 436 n.3 (1978) (citing DEBATES, *supra* note 34, at 533).

39. *See* Fletcher, *supra* note 20, at 1049 (quoting DEBATES, *supra* note 34, at 533). According to James Madison:

> [federal court] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.

Fletcher, *supra* note 20, at 1049 (quoting DEBATES, *supra* note 34, at 533).

Likewise John Marshall added:

> [i]t is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided.

Fletcher *supra* note 20, at 1049 (quoting DEBATES, *supra* note 34, at 533 which quoted John Marshall).

40. *Hall*, 440 U.S. at 437 (quoting THE FEDERALIST NO. 81, at 508 (Alexander Hamilton) (H. Lodge ed., 1908)).

41. 440 U.S. 410 (1978).

42. Nevada v. Hall, 440 U.S. 410, 436 n.3 (1978) (citing Edelman v. Jordan, 415 U.S. 651, 660-62, n.9 (1974); Monaco v. Mississippi, 292 U.S. 313, 323-30 (1934); Hans v. Louisiana, 134 U.S. 1, 12-15 (1890)).

43. *See id.*

B. THE *CHISHOLM* DECISION

Only five years after the Constitution was ratified, in apparent total disregard of the assurances sought by the various states and given by the leading supporters of the Constitution,[44] the Supreme Court in *Chisholm* decreed that a state could be sued in federal court against its will.[45] In *Chisholm,* a citizen of South Carolina brought suit against the state of Georgia in an attempt to recover a debt incurred by that state during the American Revolution.[46] Georgia refused to enter an appearance, believing it was immune from such suits due to its sovereignty.[47] However, the Court ordered Georgia to enter an appearance or risk a default.[48]

A majority of the *Chisholm* Court agreed that the state had no immunity from suit in federal court when the petitioner was a citizen of another state.[49] First, the Court agreed with Petitioner's claim that its

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44. Those state ratifying conventions that addressed the issue of a state's immunity from suit strove to explain that they agreed with the interpretation of Madison, Marshall, and Hamilton and "understood the Constitution as drafted to preserve the states' immunity from private suits." Alden v. Maine, 527 U.S. 706, 718 (1999). The ratifying convention in Rhode Island, for example, explained: "It is declared by the Convention, that the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state." *Id.* (quoting 1 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 336 (2d ed. 1896)). The New York Convention also hoped to make clear that it too interpreted Article III as lacking federal jurisdiction over criminal cases, and also as lacking the ability to grant a person a legal action against the state. *See id.* (citing ELLIOT, *supra*).

45. *See* Alden v. Maine, 527 U.S. 706, 719 (1999) (discussing *Chisholm*).

46. *See* Fletcher, *supra* note 20, at 1054-55.

47. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 419 (1793).

48. *See id.* The Court came to its conclusion after answering four questions:

> 1st. Can the state of Georgia, being one of the United States of America, be made a party defendant in any case, in the supreme court of the United States, at the suit of a private citizen, even although he himself is, and his testator was, a citizen of the state of South Carolina? 2d. If the state of Georgia can be made a party defendant in certain cases, does an action of *assumpsit* lie against her? 3d. Is the service of the summons upon the governor and attorney general of the state of Georgia, a competent service? 4th. By what process ought the appearance of the state of Georgia to be enforced?

Id. at 420.

The first question was the foundational issue. *See id.* That all-important question was whether a resident of another state could hail Georgia, as one of the states of the union, into federal court as a defendant. *See* Fletcher, *supra* note 20, at 1055. The Court also relied upon three basic principles; first, its understanding of diversity jurisdiction between a citizen and a State within Article III, section 2 of the United States Constitution. *See* H. Stephen Harris, Jr. & Michael P. Kenny, *Eleventh Amendment Jurisprudence After Atascadero: The Coming Clash with Antitrust, Copyright, and Other Causes of Action Over Which the Federal Courts Have Exclusive Jurisdiction*, 37 EMORY L.J. 645, 652 (1988). Second, it relied upon the belief that the sovereign immunity of the several states was, in fact, very limited. *See id.* Third, the Court relied on the Judiciary Act of 1789 for its grant of authority. *See id.*

49. *See id.* Though all five justices wrote separate opinions, four of them concurred in result and agreed that the literal language of Article III governed the case. *See Alden*, 527 U.S. at 719. Chief Justice Jay and Justice Wilson, both concurring, argued that sovereign immunity was wholly incompatible with the Constitution's new theory of popular sovereignty. *See id.* (citing *Chisholm*, 2 U.S. (2 Dall.) at 454-58 (Wilson, J.), 470-72 (Jay, C.J.)). Also concurring, Justices Blair and Cushing were not willing to agree that sovereign immunity was inconsistent with the Constitution, but did argue that the states had voluntarily waived sovereign immunity by ratifying that document. *See id.* (citing *Chisholm*,

jurisdiction was derived from both the Constitution and the Judicial Act of 1789.[50] It next looked at these sources of law and applied the second section of Article III of the Constitution literally.[51] The Court examined the words of the Article concerning the extension of controversies "between a State and Citizens of another State."[52] Likewise, the Plaintiff urged the Court to literally apply the words of the Act: "[i]n cases in which a State shall be a party, the supreme court shall have original jurisdiction."[53] The Court concluded that Article III made the state of Georgia sueable by the South Carolinian and that the first Congress had granted the federal courts jurisdiction to hear such suits.[54]

C. "PROFOUND SHOCK" AND THE ELEVENTH AMENDMENT

Many states were "profoundly shocked" by *Chisholm*, which allowed a non-citizen to sue a state.[55] The states were concerned with the decision's general challenge of their sovereignty, but the states were particularly worried because they, like Georgia, had large debts as a

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2 U.S. (2 Dall.) at 452 (Blair J.), 468 (Cushing, J.)).

50. *See Chisholm*, 2 U.S. (2 Dall.) at 420.

51. *See* Harris & Kenny, *supra* note 48, at 652 n.24 (suggesting that the Court looked only to the literal language).

52. *Alden*, 527 U.S. at 719 (citing *Chisholm*, 2 U.S. (2 Dall.) at 420).

53. *Chisholm*, 2 U.S. (2 Dall.) at 420.

54. *See Alden*, 527 U.S. at 719 (citing *Chisholm*, 2 U.S. (2 Dall.) 419). Though he was the lone dissenter, Justice Iredell's position was vindicated in 1798 by the ratification of the 11th Amendment. *See Chisholm*, 2 U.S. (2 Dall.) at 429 (Iredell, J., dissenting). His opinion has become part of the bedrock of the modern sovereign immunity doctrine. *See Alden*, 527 U.S. at 727.

Justice Iredell attempted to find precedent for this early case in one of the few sources available to him, English common law. *See Chisholm*, 2 U.S. (2 Dall.) at 435 (Iredell J., dissenting). Iredell noted that "[t]he only principles of law, . . . that can be regarded, are those common to all the states." *Id.* The one law that was common to all the states was, of course, that law which the many states had inherited from England. *See id.* Therefore Justice Iredell began a detailed study of English history. *See Alden*, 527 U.S. at 720; *see also Chisholm*, 2 U.S. (2 Dall.) at 437-46.

He explored the principles of expressed powers and sovereign immunity. *See Alden*, 527 U.S. at 720; *see also Chisholm*, 2 U.S. (2 Dall.) at 435-38, 448-50. Justice Iredell pondered what remedies were available to royal subjects when they sought redress of a grievance from their sovereign, the royal person of England. *See Chisholm*, 2 U.S. (2 Dall.) at 435. Like many of the Framers, Justice Iredell, viewed each of the many states as a sovereign. *See id.* He argued that each state in the Union retained the sovereignty it enjoyed before the Constitution's enactment, except for those powers surrendered by the plan of the convention. *See id.* In essence, Justice Iredell's *Chisholm* dissent argued that the Constitution was not designed to invent new forms of remedies by forcing the states to answer suits for the first time, but rather was an attempt to secure neutral forums for those parties that were traditionally subject to suit. *See* Hans v. Louisiana, 134 U.S. 1, 12 (1890).

It should also be noted that while Iredell disagreed with his brethren that a state was sueable on a common law action, he withheld judgment on whether the court could hear actions based on federal law. *See* Fletcher, *supra* note 20, at 1057 (explaining that it is likely that the four justices who were moved to find that the common law action was a valid bases for a suit against a state, would also have concluded similarly about suits arising out of federal law). Georgia was being sued on a common law action of assumpsit. *See* Fletcher, *supra* note 20, at 1057.

55. *See Alden*, 527 U.S. at 720 (quoting 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 93 n.1 (1922)).

result of the American Revolution.[56] These states feared they would be bankrupted if they were suddenly forced to pay their war debts.[57]

Congress also reacted strongly to the *Chisholm* decision.[58] The day after the Court decided *Chisholm,* a constitutional amendment to overrule the decision was proposed on the floor of the United States House of Representatives.[59] Congress recessed without taking action, but when Congress resumed session, it endorsed the proposed amendment and sent it to the states within three months.[60] In fact, each house of Congress only debated the issue for one day before voting overwhelmingly to pass the proposed amendment on to the states.[61] Within two years[62] after

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56. *See* Fletcher, *supra* note 20, at 1058.

57. *See* Fletcher, *supra* note 20, at 1058 n.114 (explaining that the state debt came from two main sources). First, to generate funds to the fight the war, states sold bonds to citizens and non-citizens alike, which had not yet been paid. *See* Fletcher, *supra* note 20, at 1058 n.114. Second, the holdings of many loyalists within the state were seized as the war continued and those loyalist could perhaps seek to legally recover their property. *See* Fletcher, *supra* note 20, at 1058 n.114. Suits by private citizens to recover state held debt were not just a mere possibility on the horizon, but a realized threat, for suits of this sort were launched against "the States in South Carolina, Georgia, Virginia, and Massachusetts." Fletcher, *supra* note 20, at 1058 n.114.

In response to its defeat in *Chisholm*, the Georgia House of Representatives decreed that no one in the state should in any way act upon the federal court's *Chisholm* order. *See* Fletcher, *supra* note 20, at 1058. Further, the state provided that anyone who tried to do so "'[would be] hereby declared to be guilty of [a] felony, and shall suffer death, without the benefit of clergy, by being hanged.'" Fletcher, *supra* note 20, at 1058 (quoting AUGUSTA CHRON., Nov. 23, 1793, which was quoted in C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 56-57 (1972)).

Similarly, if somewhat more calmly, the Massachusetts Legislature protested that the decision was "repugnant to the first principles of a federal government." Alden v. Maine, 527 U.S. 706, 720 (1999) (quoting 15 PAPERS OF ALEXANDER HAMILTON at 314 (H. Syrett & J. Cooke eds., 1969) [hereinafter "PAPERS"]). Further, the Massachusetts Legislature instructed its state's congressional representatives to "remove any clause or article of the Constitution, which can be construed to imply or justify a decision, that, a State is compelled to answer in any suit by an individual or individuals in any Court of the United States." *Id.*

58. *See Alden*, 527 U.S. at 721.

59. *See id.*

60. *See id.* (citing 4 ANNALS OF CONGRESS 25, 30, 477, 499 (1794)).

61. *See id.* (citing 4 ANNALS OF CONGRESS 30-31, 476-78 (1794)). The vote tally in the House was 81 for and 9 against. *See id.* The results in the Senate were similar: 23 for and 2 against. *See id.*

The first version of the amendment, submitted one day after the *Chisholm* decision, read:

> That no state shall be liable to be made a party defendant in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States.

Fletcher, *supra* note 20, at 1058-59 (citing PA. J. & WEEKLY ADVERTISER, Feb. 27, 1793, at 1). Further, Fletcher noted that this proposed amendment does not appear in the *Annals of Congress*. *See* Fletcher, *supra* note 20, at 1059 n.116.

A second proposal for an amendment was offered two days after the *Chisholm* decision. It stated:

> The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Fletcher, *supra* note 20, at 1059. Without addressing the issue further, Congress took its recess, nearly a month after the *Chisholm* decision. *See* Fletcher, *supra* note 20, at 1059. The language that would become the actual amendment was introduced at the beginning of the 1794 session of Congress. *See*

Chisholm, the necessary number of states had ratified the amendment, and it was later certified by the President as the Eleventh Amendment.[63]

Fletcher, *supra* note 20, at 1059. Thus the Amendment today reads:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. CONST. amend. XI. On the floor of the House, an attempt to amend the proposed amendment would have added the following clause: "Where such State shall have previously made provision in their own Courts, whereby such suit may be prosecuted to effect." Fletcher, *supra* note 20, at 1059.

This defeated clause would have qualified the Amendment in such a way that *Chisholm* would have been overruled only where the state courts had already exerted jurisdiction over the areas which would be excluded by the Amendment. *See* Fletcher, *supra* note 20, at 1059.

Likewise, the Senate rejected an attempt to make the Amendment applicable only to those cases where "the cause of action shall have arisen before the ratification of the Amendment." *Alden*, 527 U.S. at 721 (citing 4 ANNALS OF CONGRESS 30, 476 (1794)). Yet another objection came from a senator, who proposed suits arising under treaty obligations should be outside of the amendment's prohibitions and, therefore, within the jurisdiction of the federal courts. *See id.* It is speculated that Senator Albert Gallatin of Pennsylvania so moved to ensure federal enforcement of state debts to foreign sovereigns. *See* Fletcher, *supra* note 20, at 1059.

Professor Fletcher argues that a careful study of the evolution of the proposed Amendment's language suggests its original meaning was not as extensive as the current Court thinks. *See* Fletcher, *supra* note 20, at 1060 (arguing "that the [E]leventh [A]mendment had a more modest purpose than to forbid private citizens' suits against the states"). First, Fletcher argues that the very first versions of the amendment seem to have "so clearly been intended to prohibit the exercise of federal jurisdiction in suits brought by private citizens" that it would have supported the Court's present interpretations of the document as a grant of immunity from federal subject matter jurisdiction. Fletcher, *supra* note 20, at 1060. Moreover, the language was changed from an exhaustive description of citizenship to a draft whose verbiage only referred to out-of-state and foreign citizens. *See* Fletcher, *supra* note 20, at 1060. Thus, Fletcher argues that the changes "suggest strongly that rather than intending to create a general state sovereign immunity protection from all suits by private citizens, as the first proposal would have done, the drafters of the second and third proposals intended only to limit the scope of that part of Article III's jurisdictional grant—the state-citizen diversity clause—that had led to *Chisholm*." Fletcher, *supra* note 20, at 1060.

Alternatively, Fletcher suggests if Congress did intend a general immunity the drafting was "extraordinarily inept" and the outcome "unlikely." Fletcher, *supra* note 20, at 1060. The unlikely result is one in which a citizen of Iowa, for example, could sue Iowa in federal court on a matter of federal law; while a non-citizen, with an identical claim and seeking redress from the very same state and from the very same federal court, would have his or her suit barred. *See* Fletcher, *supra* note 20, at 1060-61.

62. *See* Fletcher, *supra* note 20, at 1159 n.123 (citing R. MORRIS, JOHN JAY, THE NATION, AND THE COURT 69 (1967), in which Professor Morris reasoned that Chief Justice Jay declined reappointment to the chiefship of the Court in part because the rapid amending of the Constitution following *Chisholm* convinced him that the Court "would not have great influence in the national life").

63. *See* Fletcher, *supra* note 20, at 1059 n.122 (discussing C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972), which concluded that the twelve necessary states had ratified by 1795, well before President Adams' 1798 certification of this fact).

Thus, *Chisholm* was rapidly overruled.[64]

D. *HANS V. LOUISIANA*

Nearly 100 years after *Chisholm v. Georgia*, the Supreme Court decided *Hans v. Louisiana.*[65] Hans, a citizen of Louisiana, brought the case in an attempt to recover a debt from the State of Louisiana.[66] Hans asserted that as a citizen of Louisiana, his private action was not barred from the federal court by the Eleventh Amendment.[67]

However, the Court reasoned that though the Eleventh Amendment did not speak to a state's own citizens, to conclude that such immunity did not exist would produce an "anomalous result."[68] The Court reasoned that if it were to recognize such a situation, it would puzzle the country in the same way that the *Chisholm* decision had years earlier.[69] The *Hans* Court thought that the *Chisholm* Court was "swayed by a close observation of the letter of the Constitution, without regard to

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64. *See* Fletcher, *supra* note 20, at 1059. Once the Eleventh Amendment was enacted, much of the Supreme Court's jurisdiction over the states evaporated. *See* Gibbons, *supra* note 17, at 1941. Accordingly, there were few occasions in which the States needed to employ a sovereign immunity defense. *See* Gibbons, *supra* note 17, at 1941. This was true largely because there was very little federal law and therefore the States largely escaped the jurisdiction of the federal courts. *See* Gibbons, supra note 17, at 1941. Consequently, one of the only areas in which a sovereign immunity defense would be asserted by a state in federal district court were under the federal admiralty jurisdiction. *See* Gibbons, *supra* note 17, at 1941 n.280 (relying upon the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789)). The federal courts also had jurisdiction over suits where the federal government was itself a plaintiff. *See* Gibbons, *supra* note 17, at 1941 n.281 (relying on the Judiciary Act of 1779, ch 20 § 9, 11, 1 Stat., 73, 77, 78). Additionally, the Supreme Court had jurisdiction in suits among the States and appellate jurisdiction of state court decisions of federal law. *See* Gibbons, *supra* note 17, at 1941 n.282 & n.283 (relying on the Judiciary Act of 1789, ch 20, §§ 13, 25, 1 Stat. 80, 86). "Besides these," one expert in the field notes that "an assertion of sovereign immunity might arise in a suit against an individual, in which a state had an interest." Gibbons, *supra* note 17, at 1941.

The present Court seems to believe that the early interpretations of the Eleventh Amendment, in cases from these narrow fields, support its understanding of the states' immunity confirmed in *Alden*. *See Alden*, 527 U.S. at 721-22. However, the Court does not place much weight upon them because the era is largely eclipsed by *Hans*. *See generally id.* at 723-24 (discussing *Hans*).

65. 134 U.S. 1 (1890). This monumental decision was made in the 100th year of the United States Supreme Court. *See* Hans v. Louisiana, 134 U.S. 1, 11 (1890).

66. *See id.* at 1-2 (explaining that the state had sold bonds and tax coupons to fund internal improvements). The state's plan was that the coupons attached to the bonds could be used to forgive or replace the tax obligation a citizen would otherwise owe. *See id.* However, when the state fisc was diminished, Louisiana refused to honor the state bounds. *See id.*

67. *See id.* at 10 (explaining "inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State").

68. *See id.* The Court went on to describe specifically the anomaly by saying:

> in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts.

Id.

69. *See id.* at 11 (explaining that the *Chisholm* decision "created . . . a shock of surprise throughout the country"). Thus, Justice Bradley coined the "shock theory" of the *Chisholm* decision. *See* Gibbons, *supra* note 17, at 2001.

former experience and usage."[70] Conversely, Justice Iredell[71] had argued in his *Chisholm* dissent that each state in the Union retained the sovereignty it enjoyed before the Constitution's enactment, except for those powers surrendered by the plan of the convention.[72] In essence, Justice Iredell's *Chisholm* dissent maintained that the Constitution was not designed to invent new forms of remedies by forcing the states to answer a new class of suits for the first time, but rather was an attempt to secure neutral forums for those parties that were traditionally subject to suit.[73] The Court in *Hans* asserted that the Eleventh Amendment had confirmed the *Chisholm* dissent as the correct position with regard to the "suability of the States by individuals."[74]

"Can we suppose," asked the *Hans* Court, "that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?"[75] The answer to this question, as far as the *Hans* Court was concerned, was no.[76] The *Hans* Court explained that "[t]he suability of a State, without its consent was a thing unknown to the law."[77] It continued, "[t]his has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted."[78]

Finally, the Court declared:

> It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence.[79]

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70. *Hans*, 134 U.S. at 12.

71. *See id.* Justice Iredell dissented in the *Chisholm* decision, but he had his position confirmed by the quick ratification of the 11th Amendment. *See id.*

72. *See id.*

73. *See id.* at 12.

74. *Id.*

75. *Id.* at 15. Further, the Court inquired:

> Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the constitution or laws of the United States: can we imagine that it would have been adopted by the States?

Id.

76. *See id.* at 15 (commenting, that it would be "almost an absurdity on its face" to conclude either question could be answered "yes").

77. *Id.* at 16.

78. *Id.*

79. *Id.* at 21.

Thus the Court, with only partial support from the Eleventh Amendment[80] and a largely "empty analysis,"[81] declared that a state was immune from suits prosecuted by foreign nationals, and the citizens of other domestic states,[82] as well as its own state citizens in federal court.[83] Consequently, the *Hans* Court transformed the Eleventh Amendment from a narrowly written overruling of *Chisholm* into its present incarnation as a broad recognition of the doctrine of sovereign immunity as a fundamental first principle of our government.[84]

E. THE MODIFICATION OF THE DOCTRINE OF SOVEREIGN IMMUNITY AFTER *HANS*

The interpretation of the doctrine of sovereign immunity after *Hans* was indeed broad.[85] Perhaps too broad, for the Court carved an exception from the doctrine in 1908.[86] This exception, the doctrine of *Ex parte Young*,[87] allowed a state official to be sued even when acting within a legal capacity, if the state law under which the officer is acting is unconstitutional.[88]

The exception was conceived after the Minnesota Legislature passed a law which, once in effect, would have prohibited any railway operating in the state from charging more than two cents a mile for the transportation of freight.[89] The railways refused to obey this law,[90] believing it amounted to a confiscation of property without due process and a violation of the Fourteenth Amendment.[91] Predictably, the stockholders of each of the railways brought suit in federal court the day before the

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80. *See* U.S. CONST. amend. XI.

81. Gibbons, *supra* note 17, at 2002 (calling it an "empty analysis").

82. *See* Hans v. Louisiana, 134 U.S. 1, 10 (1890) (explaining "that a state cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases").

83. *See id.* at 12. After the First World War, the rule from *Hans* would be extended once more to thwart the suits of foreign sovereigns. *See* Monaco v. Mississippi, 292 U.S. 313, 329-30 (1934) (extending sovereign immunity protection of the states to included private suits brought in federal court against a state by foreign sovereigns).

84. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984) ("The Amendment's language overruled the particular result in *Chisholm*, but this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.").

85. *See Monaco*, 292 U.S. at 329-30 (discussing the extent of immunity states enjoyed).

86. *See Ex parte* Young, 209 U.S. 123, 158-60 (1908) (providing an exception to the general rule by allowing state officers to be sued even when acting upon a state law which would otherwise be valid if it were not for the United States Constitution).

87. 209 U.S. 123 (1908).

88. *See Ex parte* Young, 209 U.S. 123, 158-60 (1908).

89. *See id.* at 127-28.

90. *See id.* at 129.

91. *See id.* at 144.

act was to become effective.[92] After a hearing, the federal court for the District of Minnesota issued a temporary injunction on all parties.[93] Despite this order, the Minnesota attorney general petitioned a Minnesota state court and received a writ ordering the Northern Pacific Railway Company to follow the state law.[94] The attorney general claimed that he was acting as an officer of the state, and thus the federal court's injunction illegally prohibited a state action to enforce domestic laws.[95]

After stating the rule from *Hans*, the Court proceeded to carve an exception from it, allowing federal courts to pierce the veil of the state's immunity in certain circumstances.[96] The Court reasoned that the state is *incapable* of acting in a manner inconsistent with the United States Constitution.[97] If, therefore, a state passes an act that is contrary to the supreme law of the land, the state law is void.[98] Accordingly, if state officials act pursuant to that invalid act, they act alone, without the state, because their state-vested authority evaporates with regard to all illegitimate state acts.[99] Thus, "[i]t is simply an illegal act on the part of a state official, attempting, by the use of the name of the State, to enforce a legislative enactment which is void because it is unconstitutional."[100]

This "fiction"[101] allows otherwise immune states to be held responsible for their actions via their officials.[102] However, this doctrine has itself been restricted in two important ways.[103] First, in *Edelman v. Jordan*,[104] the Court in 1974 recognized a distinction between cases seeking relief for prospective harm versus retroactive harm.[105] Essentially, the Court allowed for injunctions to prevent future constitutional impact, but

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92. *See id.* at 129.

93. *See id.* at 132 (explaining the railway companies were not to change their rates while the attorney general of Minnesota was ordered not to take any action to enforce the law or punish violations of it until the matter was resolved at court).

94. *See id.* at 133-34. This infraction landed the attorney general of the state of Minnesota in the custody of a United States Marshal pursuant to a contempt order from the federal court. *See id.* at 126.

95. *See id.* at 149.

96. *See id.* at 150.

97. *See id.* at 159-60.

98. *See id.* This was also the case in *Ex parte Young*, where the attorney general of Minnesota violated the Federal Constitution by enforcing a state law. *See Ex parte* Young, 209 U.S. 123, 158-60 (1908).

99. *See id.*

100. *Id.*

101. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (declining to extend the *Ex parte Young* "fiction").

102. *See Ex parte Young*, 209 U.S. at 158-60 (providing an exception to the general rule of *Hans*).

103. *See* Edelman v. Jordan, 415 U.S. 651, 677 (1974) (limiting the *Ex parte Young* doctrine to prospective relief); *see also Halderman*, 465 U.S. at 106 (arguing that "the entire basis for the doctrine of *Young* and *Edelman* disappears" when the state actor has violated a state law).

104. 415 U.S. 651 (1974).

105. *See* Edelman v. Jordan, 415 U.S. 651, 677 (1974).

it refused to allow monetary damages to be awarded for any past constitutional violations.[106] This conclusion was based upon the assumption that any such monetary award would end as an assault on the state treasury and thus threaten the States sovereignty.[107]

A second limitation on the doctrine was developed in *Pennhurst State School & Hospital v. Halderman*[108] in 1984, which suggested that "the entire basis for the doctrine of *Young* and *Edelman* disappears" when the state actor has violated a state law as opposed to a federal law.[109] The Court reasoned that in this type of case a federal right was not being championed, but rather a state right was being infringed.[110]

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106. *See id.* "[A] federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury." *Id.* Thus, the Court relied on *Ex parte Young* as support for the proposition that despite the Eleventh Amendment, the federal court can order injunctions against state officials. *See id.* at 667. However, the Court cited *Ford Motor Co. v. Department of Treasury* for its prohibition of financial retroactive relief. *See id.* (citing generally Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945)). The Court said in *Ford:* "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 663 (quoting *Ford,* 323 U.S. at 464).

107. *See Edelman,* 415 U.S. at 665 (quoting Rothstein v. Wyman, 467 F.2d 226, 236-37 (2d Cir. 1972)). In *Edelman,* the Court opined:

> It is not pretended that these payments are to come from the personal resources of these appellants. Appellees expressly contemplate that they will, rather, involve substantial expenditures from the public funds of the state. . . .
>
> It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.

Id.

108. 465 U.S. 89 (1984).

109. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (arguing that the *Ex parte Young* doctrine is inapplicable against state officers offending only state law).

110. *See id.* at 105-06. In *Halderman,* the plaintiffs were residents of a state mental hospital in Pennsylvania and those other parties interested in the welfare of these residents, such as the Pennsylvania Association for Retarded Citizens. *See id.* at 92. The suit was against the Pennsylvania Department of Public Welfare and its officers, as well as the state hospital's key administrative staff. *See id.* The complaint alleged that conditions at the state hospital "violated the class members' rights under the Eighth and Fourteenth Amendments" and several congressional and state acts. *Id.* The conditions at the hospital were sad, to say the least, and the district court judge who observed the facts before the case was appealed commented: "Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded." *Id.* at 92-93 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 7 (1980) [hereinafter Halderman III]). As a result, the district court ordered "immediate steps be taken to remove the retarded residents from Pennhurst." *Halderman,* 465 U.S. at 93 [hereinafter Halderman II] (quoting Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295, 1325 (E.D. Pa. 1977) [hereinafter Halderman I]). The district court also appointed a "master" to oversee the state efforts to correct the problems at Pennhurst. *See id.* at 93. The state appealed the decision, arguing, most importantly, that "the Eleventh Amendment prohibited the District Court from ordering state officials to conform their conduct to state law." *Id.* at 97.

This infringement of the state's power by the federal court was inconsistent with the concept of federalism, which provided the foundation for the United States' system.[111]

Consequently, the *Hans* rule, though still controlling legal authority, is limited by the *Ex parte Young* doctrine, which itself has two limitations placed upon it.[112] Therefore, a state is immune from suits waged by foreign nationals, the citizens of other domestic states,[113] and its own state citizens in federal court.[114] Additionally, the states are immune from suits of foreign sovereigns.[115] However, a state official may be sued if he or she enforces a state act that is inconsistent with the federal law.[116] If the state official acts only contrary to state laws, he or she may be shielded from suit by a state's immunity.[117] Further, even if the state officer has violated a federal right by enforcing a state act, the damages will be limited to prospective as opposed to retroactive, monetary damages.[118] However, in certain circumstances, Congress can force a state to subject itself to private law suits, or in other words, Congress can abrogate a state's sovereign immunity.[119]

F. CONGRESSIONAL ABROGATION OF STATES' IMMUNITY

Fitzpatrick v. Bitzer[120] established that Congress may authorize private suits against the states when exercising its power to enforce the Fourteenth Amendment.[121]

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111. *See id.* at 106 (making this point, the Court noted: "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law").

112. *See id.* at 104-06.

113. *See* Hans v. Louisiana, 134 U.S. 1, 10 (1890) ("[A] State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, [and this] is clearly established by the decisions of this court in several recent cases.").

114. *See id.* at 10-11 (discussing the impracticality of the "anomalous result" of allowing citizens of a state the ability to sue their home state in federal courts where like suits against foreign states are not granted such jurisdiction).

115. *See* Monaco v. Mississippi, 292 U.S. 313, 329-30 (1934) (extending sovereign immunity protection against a state by foreign sovereigns).

116. *See Ex parte* Young, 209 U.S. 123, 159-60 (1908).

117. *See Halderman II*, 465 U.S. at 106.

118. *See* Edelman v. Jordan, 415 U.S. 651, 677 (1974) ("[A] federal court's remedial power, . . . is necessarily limited to prospective injunctive relief.").

119. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (establishing that Congress can abrogate a state's immunity pursuant to Congress's 14th Amendment enforcement power).

120. 427 U.S. 445 (1976).

121. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). In *Fitzpatrick*, a plaintiff sued the State of Connecticut in federal court, arguing that parts of the state retirement plan discriminated on the basis of sex, and thus violated Title VII of the Civil Rights Act of 1964. *See id.* at 448 n.1 (discussing Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a) (1994)).

The first section of the Fourteenth Amendment provides the substantive rights guaranteed by the document;[122] namely, the due process, equal protection, and privileges or immunities section.[123] Congress was granted the authority to enforce these rights by the Amendment's final clause.[124] The *Fitzpatrick* Court reasoned that Congress's enforcement power included the creation of private actions because such actions could be considered "appropriate legislation," which was explicitly authorized by the Amendment.[125] Further, the Court acknowledged that the Civil War amendments had been an intrusion of federal power into previous pockets of state authority.[126] However, the Court noted that the Eleventh Amendment and the state sovereign immunity, which it has come to represent,[127] could not entirely shield the states from such an invasion.[128] This was true because Congress was granted the authority to enforce the Fourteenth Amendment by that Amendment's final clause, thereby limiting the Eleventh Amendment's recognition of state immunity.[129]

Despite the creation of a congressional power to abrogate the states' sovereign immunity, that power has not been allowed to grow.[130] In the 1989 case of *Pennsylvania v. Union Gas Co.*,[131] a plurality of the Court successfully extended Congress's power to abrogate state immunity in federal court to legislation founded upon the Commerce Clause as well

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122. *See* U.S. CONST. amend. XIV, § 1.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

123. *See id.*

124. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

125. *See Fitzpatrick*, 427 U.S. at 456 (quoting "by appropriate legislation" from United States Constitution, Twenty-fourth Amendment, section five).

126. *See id.* at 455. This intrusion worked an "expansion of Congress's powers—with the corresponding diminution of state sovereignty—found to be intended by the framers and made part of the Constitution upon the States' ratification of those Amendments." *Id.* at 455-56.

127. *See* Hans v. Louisiana, 134 U.S. 1, 10-11 (1890) (expanding the meaning of the Amendment beyond the text of the document).

128. *See Fitzpatrick*, 427 U.S. at 456.

129. *See id.*; *see also* U.S. CONST. amend. XIV, §§ 1, 5. The Fourteenth Amendment's section 1 provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

While section five of the Fourteenth Amendment reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

130. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72 (1996) (refusing to allow Congressional abrogation of a state's immunity with Congress's Commerce Clause power).

131. 491 U.S. 1 (1989).

as the Fourteenth Amendment.[132] However, this enlargement of congressional power was rejected by a majority of the Court just seven years later in the 1996 decision of *Seminole Tribe of Florida*, which explicitly overruled *Union Gas Co.* and restricted Congress's abrogation power to laws properly based upon the Fourteenth Amendment.[133] In *Seminole Tribe of Florida*, the Court explained that:

> *Fitzpatrick*[134] was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.[135]

Thus, the Court concluded: "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[136]

Additionally, the *Seminole* Court reiterated that before any court may declare that a state's immunity has been abrogated by congressional act, the court must first find "a clear legislative statement"[137] by Congress that "mak[es] its intention unmistakably clear in the language of the statute."[138] Consequently, after *Seminole Tribe of Florida*, only the Fourteenth Amendment's enforcement clause provides the power for

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132. Pennsylvania v. Union Gas Co., 491 U.S. 1, 15 (1989) (reasoning that Congress's power to regulate interstate commerce under the Commerce Clause allowed it to abrogate a state's immunity when it was necessary to do so to successfully regulate interstate commerce), *overruled by Seminole Tribe of Florida*, 517 U.S. 44.

133. *See Seminole Tribe of Florida*, 517 U.S. at 66. In *Seminole*, the Seminole Tribe of Florida filed suit in federal court to force Florida Governor Lawton Chiles to engage in good faith negotiations with regard the commencement of Indian gaming in accord with the provisions of the Indian Gaming Regulatory Act. *See id.* at 50-52. In response, the State of Florida responded by asserting an Eleventh Amendment sovereign immunity defense and moved to dismiss the case. *See id.* at 52.

134. *Fitzpatrick* recognized an abrogation power in the 14th Amendment. *See Seminole Tribe of Florida*, 517 U.S. at 65 (discussing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)).

135. *Id.* at 65-66 (citing *Fitzpatrick*, 427 U.S. at 454).

136. *Id.* at 72-73. Further, the *Seminole Tribe of Florida* decision "reconfirm[ed] that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . under the exclusive control of the Federal Government." *Id.* at 72. The Court continued that "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, [like interstate commerce], the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.*

137. *Id.* at 54 (citing Blatchford v. Native Village of Noatak & Circle Village, 501 U.S. 775, 786 (1991)).

138. *Id.* at 56 (citing Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989)).

congressional abrogation of the states' sovereign immunity in federal court, and then only upon a showing of clear congressional intent to do so.[139]

Congress's power to abrogate under the Fourteenth Amendment has recently been limited further.[140] In 1997, the Court surprised some when it narrowed Congress's authority to create laws based upon the Fourteenth Amendment.[141] In *City of Boerne v. Flores*,[142] the Court struck down the 1993 Religious Freedom Restoration Act (RFRA), after concluding that Congress exceeded its power that was granted by section five of the Fourteenth Amendment.[143] The *City of Boerne* Court reasoned that Congress had been granted only the power "to enforce the provisions of the [Fourteenth Amendment]" not the power to create new rights.[144] The Court continued "that while the Congress had the power to pass remedial measures to protect the free exercise of religion, it did not have the power to rewrite the free exercise clause."[145] Further, the Court explained that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[146] The Court then concluded that this proportional and remedial relationship was absent from the RFRA, and it was thus doomed.[147]

As a result of *Seminole Tribe of Florida*, only the Fourteenth Amendment's Enforcement Clause provides the power for congressional abrogation of the states' sovereign immunity in federal court.[148] After

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139. *See id.* at 66 (concluding "*Union Gas* was wrongly decided").

140. *See generally* City of Boerne v. Flores, 521 U.S. 507 (1997).

141. *See* Dan Schweitzer, *Alden, College Savings Bank, and Florida Prepaid: What They Hold and What They Mean to the Future of Federal State Relations*, NAT'L ENVTL. ENFORCEMENT J., Sept. 1999, at 2 (explaining that "[a]lthough many had read *Katzenbach v. Morgan*, 348 U.S. 641 (1966), to permit Congress to decree the substantive scope of the rights guaranteed by the Amendment, *City of Boerne* rejected that interpretation of *Katzenbach* and of Section 5"); *see also City of Boerne*, 521 U.S. at 527-28 (responding to those who had read *Morgan* expansively). The Court explained that "[T]here is language in our opinion in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in [section one] of the Fourteenth Amendment." *Id.* at 528. The Court continued: "This is not a necessary interpretation, however, or even the best one." *Id.*

142. 521 U.S. 507 (1997).

143. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

144. *Id.* at 519 (quoting U.S. CONST. amend. XIV, § 5).

145. *Id.* at 519-20 ("Congress does not enforce a constitutional right by changing what the right is . . . .").

146. *Id.* at 520.

147. *See id.* at 530-32. The Court added that "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" *Id.* at 529 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). Rather, the Court explained "[i]t would be on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." *Id.*

148. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 66 (1996) (concluding "*Union Gas* was wrongly decided").

City of Boerne, Congress's sole power to force private party lawsuits upon the states in federal court is itself narrowed to allow only those laws which prevent or remedy an infringement of the rights provided by the Fourteenth Amendment.[149] Even after these decisions, however, private lawsuits based upon federal law were still being prosecuted against the states, albeit in state courts.[150]

III. ANALYSIS

Justice Kennedy delivered the opinion of the Court, in which Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, and Justice Thomas, joined in the five-to-four decision.[151] Justice Souter filed a dissenting opinion in which Justice Stevens, Justice Ginsburg, and Justice Breyer, joined.[152]

A. MAJORITY

The Court in *Alden* was faced with a question of first impression, but within an area of substantial history.[153] The issue the Court faced was whether Congress could abrogate a state's sovereign immunity in state court with Congress's Article I powers.[154] To resolve this question, the Court first considered the question of sovereign immunity in terms of the Constitution's structure, history, and how the Court has interpreted it over the years.[155]

The Court reasoned that the Constitution established a federal system which recognized and maintained the states as sovereigns.[156] The document does this in two ways.[157] First, it "reserves to [the states] a substantial portion of the Nation's primary sovereignty, together with the

149. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997). Further, an act must "be congrue[nt] and proportional [to] the injury to be prevented or remedied and the means adopted to that end." *Id.* at 530.

150. *See generally* Alden v. Maine, 527 U.S. 706 (1999).

151. *See id.* at 710.

152. *See id.*

153. *See id.* at 741 (observing that the doctrine of sovereign immunity has a long history, while the question of a state's immunity in its own court from actions based on federal laws was previously unanswered). While the dissent predicted an ill impact, the Court observed that the nation managed to conduct its affairs for 210 years without finding it necessary to ask whether Congress had the power to abrogate the states' immunity in a state court. *See id.* at 755-57. The implication being, if the question was not asked for over two centuries, how can its answer now have an earth shattering effect? *See id.* at 757.

154. *See id.* at 712-13. It was established in *Seminole Tribe of Florida* that Congress lacks this power in federal court. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 75 (1996).

155. *See Alden*, 527 U.S. at 712-13.

156. *See id.* at 713.

157. *See id.* at 714.

dignity and essential attributes inherent in that status."[158] Second, in those areas to be governed by the Congress, it must govern people not states.[159] That is to say that the Congress may not take over a state's political procedures or institutions to affect its will, but rather must govern the people of the state.[160] Therefore, rather than "relegating" the states to political subdivisions of the whole, the federal structure allowed the states to keep the sovereignty they enjoyed before the Constitution's ratification.[161]

The Court noted that the history of the Constitution and sovereign immunity is indeed a long one.[162] First, the Court observed that sovereign immunity is an ancient doctrine that existed long before the ratification of the Constitution and was well developed in England as well as in the colonies at the time of the American Revolution.[163] Likewise, as the Constitution was ratified, the Court was convinced that the majority of the framers understood that the states would enjoy the immunity due a sovereign.[164] Further, the Court saw that the quick ratification of the Eleventh Amendment to overrule the *Chisholm* decision[165] was an indication of the country's understanding that the states remained immune sovereigns, even after the Constitution's ratification.[166] Thus, as the Court looked into the history surrounding the Constitution's ratification, the *Chisholm* decision, and the Eleventh Amendment, it found that the views of Alexander Hamilton, James Madison, John Marshall, and Justice Iredell[167] supporting the interpretation that the states retained their sovereign immunity, were correct.[168] Moreover, the Court reasoned that these advocates were victorious in their effort to champion this cause throughout history.[169]

The Court then looked at the history of Eleventh Amendment adjudication and concluded that it is a history of consistent interpretation on the matter of the states' sovereign immunity.[170] The Court viewed

158. *Id.*
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.* at 715-27 (describing several instances where the Founders found and adapted the notion of sovereign immunity).
163. *See id.* at 715-16.
164. *See id.* at 716.
165. *See id.* at 719. In *Chisholm*, the Court read Article III literally and thus allowed a noncitizen to sue a state. *See id.*; *see also* Hans v. Louisiana, 134 U.S. 1, 12 (1890) (suggesting the *Chisholm* Court wrongly applied the letter of the law).
166. *See* Alden v. Maine, 527 U.S. 706, 719-27 (1999).
167. *See id.* at 716-20.
168. *See id.*
169. *See id.* at 726-27.
170. *See id.* at 727.

the precedent as continually refusing to be confined to the text of the document.[171] Rather, the Court saw in its past decisions an established doctrine which decreed that the Eleventh Amendment "confirmed rather than established sovereign immunity as a constitutional principle."[172] Consequently, the Eleventh Amendment does not define the limits of the theory; for those limits, one must return to the first principles of the Constitution.[173]

Thus, the Court viewed sovereign immunity as: having existed long before the Constitution,[174] being adopted within the current government by the Constitution's ratification,[175] and, further having its presence recognized by the Court as a bar to federal court jurisdiction.[176] Next, the Court observed that despite the long history and the established sovereign immunity doctrine, the question of whether a state was immune from a federal claim of action in its own courts had never been addressed by the Court.[177]

To answer this question, the Court studied the "history, practices, precedent, and structure of the Constitution."[178] First, the Court turned an ear to the past and heard nothing.[179] It was, however, a deafening nothing. The Court noted that the "most ardent opponents" of the Constitution's ratification said nothing about the states surrendering their immunity in state court.[180]

However, these very same opponents railed against the document's apparent abrogation of the states' immunity in the federal court.[181] In fact, they argued that a state would be like a petty lord in the feudal system and the federal government would be like the king; and though "no lord could be sued by a vassal in his own court . . . each petty lord was subject to suit in the courts of a higher lord."[182] The Court found this analogy to make "little sense if the States were understood to have relinquished [their] immunity."[183] Also, the reaction to *Chisholm*'s assault on the states' sovereign immunity in federal court had been so strong that the Court found it hard to believe that the same states would

171. *See id.*
172. *Id.* at 728-29.
173. *See id.*
174. *See id.* at 728.
175. *See id.* at 713.
176. *See id.* at 729 (citing Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996)).
177. *See id.* at 730.
178. *Id.* at 741.
179. *See id.*
180. *Id.*
181. *See id.*
182. *Id.* (quoting Nevada v. Hall, 440 U.S. 410, 414-15 (1979)).
183. *Id.* at 742.

allow the doors of their state courthouses to be forced open with absolutely no fuss at all.[184]

The Court also found instructive the early action or, more accurately, inaction of Congress.[185] The early sessions of Congress passed many laws providing for federal suits in the federal courts.[186] However, the Court found no evidence among these early laws of any statutes which allowed for suits in non-consenting state courts.[187]

Moreover, though previous cases were concerned with a state's immunity in federal rather than state court, several of these cases still produced dicta suggestive of the fact the state did enjoy immunity from suit in its own courts.[188] Of particular interest to the Court was the *Ex parte Young* doctrine.[189] The Court asserted that the *Ex parte Young* exception was created to ensure that the federal law would continue to be

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184. *See id.* at 743.

185. *See id.* at 743-44 (finding the enactments of early sessions of Congress a helpful contemporary guide to the Constitution). This is a common tool of the Court, for it has long believed the early sessions of Congress "provides contemporaneous and weighty evidence of the Constitution's meaning." *Id.* (citing Printz v. United States, 521 U.S. 898, 905 (1997)).

186. *See id.* at 744. The Government in *Printz* listed a number of statutes that showed that Congress had in the early years of the nation's history enacted statutes that "required state courts, to record applications for citizenship, to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State, and to register aliens seeking naturalization and issue certificates of registry." *Printz*, 521 U.S. at 905-06. The Court in *Printz* went on to state:

> Other statutes of that era apparently or at least arguably required state courts to perform functions unrelated to naturalization, such as resolving controversies between a captain and the crew of his ship concerning the seaworthiness of the vessel, hearing the claims of slave owners who had apprehended fugitive slaves and issuing certificates authorizing the slave's forced removal to the State from which he had fled, taking proof of the claims of Canadian refugees who had assisted the United States during the Revolutionary War, and ordering the deportation of alien enemies in times of war.

Id. at 906-07.

Later in *Alden*, the Court studied this list of early law and concluded that though numerous acts were passed, not one of these was a grant of a lawsuit in state court. *See* Alden v. Maine, 527 U.S. 706, 744 (1999). The Court concluded, this "suggests an assumed *absence* of such power." *Id.* (quoting *Printz*, 521 U.S. at 908).

187. *See id.* at 744. While, such statutes have recently been passed, the Court was not impressed, for they were so new that they did not cast any light on the original understanding of immunity. *See id.* at 745. Further, these recent statutes did not create causes of action in state courts alone, but rather authorized suits in either federal or state courts. *See id.* Likewise, these statutes are based on the incorrect assumption that Congress can abrogate the immunity of the states in any courthouse, federal or state. *See id.*

188. *See id.* The Court relied on some of the language of these early cases to support its position that the states may have had immunity from private actions in their own courts. *See id.* at 745-46 (quoting Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446, 451 (1883) ("It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution."); Railroad Co. v. Tennessee, 101 U.S. 337, 339 (1880) ("The principle is elementary that a State cannot be sued in its own courts without its consent. This is a privilege of sovereignty."); Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1858) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.")).

189. *See id.* at 747.

the supreme law of the nation by creating an exception to the states' immunity defense so the federal rights could be protected.[190] If the Congress could abrogate the States' immunity in state court, however, the Court reasoned such an elaborate exception as *Ex parte Young* would have been unnecessary.[191]

Finally, the Court considered whether it would be consistent with the structure of the Constitution to allow Congress to abrogate the immunity of a state in state court, yet prohibit the same in federal court.[192] Here, the Court reasoned, Congress must show the states the respect that their constitutional status as sovereigns required.[193] Further, the Court asserted that to force open the doors to a state's own courts was an even greater affront to the dignity of the state than hailing them into federal court.[194]

Likewise, the Court reasoned that to grant Congress the ability to abrogate state immunity in state courts would change the balance of power, "giving Congress a power and a leverage over the States that [wa]s not contemplated by our constitutional design."[195] Further, the result of such a shift would force the courts of a state to make financial decisions that they may be ill equipped to make.[196] Thus, courts would begin making the decisions that are at the heart of representative government.[197] Specifically, the Court worried about trial courts ordering judgments which require the "allocation of scarce resources" of a state regardless of the democratically prioritized agenda of the people of that state.[198] Moreover, the Court summarized that to conclude that Congress could do in state court what it cannot do in federal court would be to imply that for the exercise of a legitimate federal power the federal government would be forced to rely on the state courts.[199] That is to say, that Congress would have the right to pass a law, but that law would only be enforceable by a state instrument.[200] However, this cannot be, the Court reasoned, because the federal government has been given "means

190. *See id.* at 747-48.

191. *See id.* at 748. In fact, the doctrine is so elaborate that some have named it a legal "fiction." *See Haldernman II*, 465 U.S. 89, 105 (1984) (refusing to extend *Ex parte Young* "fiction" and recognizing the odd nature of the necessary exception).

192. *See* Alden v. Maine, 527 U.S. 706, 748 (1999).

193. *See id.*

194. *See id.* at 749.

195. *Id.* at 750.

196. *See id.* at 750-51.

197. *See id.* at 751 (citing Gregory v. Ashcroft, 501 U.S. 452, 461 (1991)). The Court also presumed that the decisions would be made poorly, for it is beyond the experience and instruction of most judges to reach such policy like decisions. *See id.* at 752.

198. *Id.* at 751.

199. *See id.* at 752-53.

200. *See id.*

which are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends" as Chief Justice Marshall noted in *M'Culloch v. Maryland*.[201]

The Supremacy Clause of the Constitution applies to state judges, in the same manner as it applies to federal judges.[202] It does not impose greater burdens on state judges than are imposed upon federal judges.[203] Additionally, though Article III, section one does grant federal judicial power to enumerated suits it further grants Congress the power to create other federal courts at its discretion.[204] This grant of power supports the position "that state courts may be opened to suits falling within the federal judicial power."[205] However, it does not follow that the state courts may be forced to hear classes of suits that the federal courts cannot hear at all.[206]

However, the states' sovereign immunity is not an opportunity for ignoring the federal law.[207] The Court asserted that the states must be trusted to be honorable and "obey the binding laws of United States."[208] However, the immunity of the states is limited by more than each states' good faith.[209] The states' sovereign immunity is also limited in two ways inherent to the federal system.[210]

First, the states may consent to suit in federal or state court.[211] If a state voluntarily does so, it can be sued in these forums.[212] The Court noted that many states have so consented.[213] The states were obliged to consent to certain suits by ratifying the Constitution and its amendments.[214] The states surrendered aspects of their immunity when they became part of the United States by ratifying the Constitution.[215] The Court noted that each state surrendered its immunity from suits brought by the federal government.[216] Additionally, states surrendered a further

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201. *Id.* at 753 (quoting M'Culloch v. Maryland, 18 U.S. (4 Wheat.) 316, 424 (1819)).
202. *See id.* at 753.
203. *See id.*
204. *See id.*
205. *Id.*
206. *See id.*
207. *See id.* at 754-55.
208. *Id.* at 755. The State of Maine in this case had brought itself in complete accord with the FLSA, as was "conceded by all." *Id.* at 759.
209. *See id.* at 755.
210. *See id.*
211. *See id.*
212. *See id.*
213. *See id.*
214. *See id.*
215. *See id.*
216. *See id.* at 756. The Court explained the practical differences between federally prosecuted suits and the grant of federal rights enforceable by the federal courts at the petition of private individual. *See id.* This difference is the political control implicit in the former. *See id.* The Congress and the Department of Justice each exercise a measure of control over the prosecution of suits, which

degree of their sovereign immunity when the Fourteenth Amendment became part of the Constitution.[217] The Fourteenth Amendment allows Congress broad power to ensure compliance with the Amendment's substance.[218] Thus, by voluntary or coerced consent, the states have waived some of their immunity.[219]

A second limit on a state's sovereign immunity from suit is that it does not include the state's subdivisions or employees.[220] The cities, school boards, and officers of a state do not enjoy the sovereign immunity from suit that the state does.[221] Only sovereigns, not political subdivisions, enjoy such immunity.[222]

Consequently, the states enjoy the same immunity in their own courts as they do in federal courts.[223] However, this immunity is naturally limited by the consent of the states to suit.[224] Further, the shield of immunity cannot protect the political subdivisions or officers of the state.[225]

Next, the Court turned its attention to whether Maine had waived its sovereign immunity for the purposes of the matter at hand.[226] Applying the Maine rule that holds that the state may be understood to consent only if it has expressly provided such consent, the Court quickly concluded that Maine had not waived its immunity in this area.[227] The Court's decision sparked a vigorous dissent over the substances of the decision, and also over the impact of the decision.[228]

B. DISSENT

Justice Souter first attacked the Court's understanding of constitutional theory and structure.[229] Common law, as Justice Souter under-

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is a political safeguard attempting to ensure that the good of the nation is pursued. *See id.* However, this safeguard is lacking in the grant of private actions, for an individual may prosecute a case against the state with complete disregard for the overall good of society. *See id.* Also, the Court found it curious that the solicitor general argued that Maine should be forced to give up its sovereign immunity. *See id.* at 759. Neither the general nor the Department of Labor acted upon the explicit authorization of FLSA, 29 U.S.C. § 216(c), to send even one federal attorney to Maine. *See id.* That is to say, though the FLSA provides the federal government the power to sue delinquent states itself, the federal government chose not to do so. *See id.*

217. *See id.* at 756.
218. *See id.*
219. *See id.* at 755-56.
220. *See id.* at 756.
221. *See id.*
222. *See id.* at 756-57.
223. *See id.* at 748.
224. *See id.*
225. *See id.* at 756.
226. *See id.* at 757.
227. *See id.* at 757-58 (citing Cushing v. Cohen, 42 A.2d 919, 923 (Me. 1981)).
228. *See id.* at 758-59.
229. *See id.* at 762 (Souter, J., dissenting).

stood it, is defeasible by statute.[230] So even if the theory of sovereign immunity was alive at common law in the English Americas, it was overruled and eliminated by the Constitution.[231] Instead of common law, urged Justice Souter, the Court applied a theory of natural law[232] to the question in *Alden*.[233] Even this would be acceptable, if the Court could show such a concept prevailed at the Constitution's ratification and was thus embodied by that document.[234] Of course, Justice Souter asserted that the Court was unable to do this.[235] When Justice Souter looked to the history surrounding the creation of the Constitution, its ratification, or to the early years of its implementation, he found that:

> Some Framers thought sovereign immunity was an obsolete royal prerogative inapplicable in a republic; some thought sovereign immunity was a common-law power defeasible, like other common-law rights, by statute; and perhaps a few thought, in keeping with a natural law view distinct from the common-law conception, that immunity was inherent in a sovereign because the body that made a law could not logically be bound by it.[236]

Justice Souter concluded that the group of the founders who may have believed that the states enjoyed a natural law sovereign immunity was so small that the Court's opinion could not be supported by them.[237]

In addition, Justice Souter studied the opinions expressed at the ratification debates and found none that lent support to the Court's opinion that the States enjoyed the indefeasible sovereignty found in natural law.[238] Moreover, Justice Souter argued that if a natural law understanding of sovereign immunity had prevailed at the ratification of the Constitution, the *Chisholm* Court would have mentioned it.[239] However, nowhere in the *Chisholm* writings can an understanding of a general natural sovereignty recognized by the Constitution be found.[240]

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230. *See id.*
231. *See id.*
232. *See id.* Natural law is "a universally applicable proposition discoverable by reason." *Id.* at 763.
233. *See id.*
234. *See id.*
235. *See id.* at 763-64.
236. *Id.* at 764.
237. *See id.*
238. *See id.* at 778.
239. *See id.* at 781.
240. *See id.* at 789 (observing that "[n]ot a single Justice suggested that sovereign immunity was an inherent and indefeasible right of statehood, and neither counsel for Georgia before the Circuit Court . . . nor Justice Iredell seems even to have conceived the possibility that the new Tenth Amendment produced the equivalent of such a doctrine").

Moreover, it does not matter that the *Chisholm* decision was overturned, for it still is instructive in that it reveals the fact that none of the Justices of the *Chisholm* Court believed that the states had an indefeasible natural law right to sovereign immunity.[241]

Justice Souter preliminarily concluded that even if sovereign immunity is based on natural law, it does not protect the state from the law of the federal government, for that law is from a higher sovereign.[242] If, however, the sovereign immunity doctrine employed in this case is based in the common law, as the Court insisted, it is defeasible by statute and thus has been vacated by the Constitution.[243]

Justice Souter then continued to explain that the Court's second argument was also wrong.[244] Justice Souter urged, that the structure of federalism does not suggest the states must be sovereigns in all areas.[245] Federalism divides the government into two bodies, with each body sovereign only in areas under its own control.[246] In the case at hand, the state of Maine cannot claim immunity, for the authority upon which the statute was enacted was that of the federal government.[247]

Additionally, the "dignity argument" of the Court did not convince Justice Souter.[248] Justice Souter suggested that the Court's insistence that to force the states to be amendable to suit in their own courts rob the States of the dignity inherent in sovereignty is not suitable to a republic.[249] Justice Souter continued, "it would be hard to imagine anything more inimical to the republican conception" than this notion of a state's dignity preventing it from being sued. [250] Rather, this country is based upon an assumption that the citizen and the state are governed equally by the law.[251]

Likewise, the Court suggested that to strip away state immunity would be to thwart a state's political machinery and its proper objectives.[252] Justice Souter answered this by asserting that a state's processes would only be interfered with where they are used to break federal law.[253] In those cases moreover, the will of the people is already being

241. *See id.* at 790.
242. *See id.* at 798.
243. *See id.*
244. *See id.* at 798-99.
245. *See id.* at 799.
246. *See id.* at 800.
247. *See id.*
248. *See id.* at 801-02.
249. *See id.* at 802.
250. *Id.*
251. *See id.*
252. *See id.* at 803.
253. *See id.*

thwarted, because the will of the citizens of the nation is the basis for congressional action.[254]

Justice Souter next addressed the Court's view of the history of the early sessions of Congress.[255] He further rejected the Court's contention that the inaction of early sessions of Congress illustrated an understanding by that body that it did not have the authority to abrogate the state immunity in state court.[256]

Justice Souter rejected this position for two reasons.[257] First, he argued that history does not show such an assumption.[258] For in *Hilton v. South Carolina Public Railways Commission*,[259] the Court "held that a state-owned railroad could be sued in state court under the Federal Employers' Liability Act, 45 U.S.C. sections 51-60, notwithstanding the lack of an express congressional statement."[260]

If the record were as the Court viewed it, unanimously showing an unwillingness by Congress to abrogate a state's immunity in its own courts, Justice Souter would still view a second problem with the Court's analysis in this area.[261] That problem comes from the fact that the history occurred in a milieu that has changed "in a constitutionally relevant way."[262]

At one time, the balance of power between the states and the federal government was understood to limit the scope of the Commerce Clause's application against the states.[263] Thus, it was very rare for Congress to enact any laws based upon the Commerce Clause that would require a state court to hear a suit based on a federal claim.[264] However, now the laws based upon the Commerce Clause have been expanded and are understood to be binding upon the states.[265] Consequently, the changed understanding of the commerce power made the early history relied upon by the Court of little instructive value.[266]

Additionally, Justice Souter was unimpressed by the Court's assertion that the Framers would not have expected the states to be amenable

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254. *See id.*
255. *See id.* at 804.
256. *See id.*
257. *See id.* at 804-05.
258. *See id.* at 804.
259. 502 U.S. 197 (1991).
260. Alden v. Maine, 527 U.S. 706, 804 (1999) (discussing Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 205 (1991) (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 63-64, 109 (1989), which said that "the Eleventh Amendment does not apply in state courts")).
261. *See Alden*, 527 U.S. at 804-05.
262. *Id.* at 805.
263. *See id.* at 805-06.
264. *See id.* at 806.
265. *See id.*
266. *See id.*

to a federal cause of action, based upon the commerce power, in their own courts.[267] Justice Souter observed that the Framers may well be shocked by a number of developments since the Constitution's drafting.[268] However, just because the Framers would possibly be surprised by the status of today's constitutional theory, in any number of areas, does not mean that these developments are somehow inconsistent with the Constitution.[269] Justice Souter argued that the Constitution is a living document capable of growing to meet the needs of a changing country.[270] Justice Souter reminded, that Chief Justice Marshall asserted in *M'Culloch,* "We must never forget, that it is a Constitution we are expounding."[271]

Next, Justice Souter turned his attention to the history of the FLSA itself.[272] The FLSA forces employers to pay the minimum wages and overtime wages to their employees.[273] It was enacted in 1938, but it did not apply to state employers at this early date.[274] The Court, despite arguments that the Amendment constituted an invasion of the states' sovereignty, upheld this amendment.[275]

Once more, Justice Souter reminded, that in 1974, the FLSA was amended to limit the state employers' exception even further.[276] This extension, however, was deemed unconstitutional in *National League of Cities v. Usery,*[277] because it cut too far into the state sovereignty.[278] However, *Garcia v. San Antonio Metropolitan Transit Authority*[279] in turn overruled *National League of Cities*.[280] Here, the Court determined that a city, which owned a mass-transit system, was not exempt from the FLSA because Congress had the power to force states to follow the FLSA based upon Congress's power to regulate interstate commerce.[281]

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267. *See id.*

268. *See id.* at 807.

269. *See id.*

270. *See id.* (quoting Missouri v. Holland, 252 U.S. 416, 433 (1920) (Holmes, J.)).

271. *Id.* (discussing M'Culloch v. Maryland, 18 U.S. (4 Wheat.) 316, 407 (1819)). The implication of this line can be understood as suggesting that it is a constitution rather than a more exhaustive kind of collection of laws. *See id.*

272. *See id.* at 808.

273. *See id.*

274. *See id.* (citing Maryland v. Wirtz, 392 U.S. 183, 185-186, (1968)).

275. *See id.* (discussing *Wirtz*, 392 U.S. at 201 (Douglas, J., concurring) (arguing the Tenth Amendment prohibited such an intrusion)).

276. *See id.*

277. 426 U.S. 833 (1976).

278. *See* Alden v. Maine, 527 U.S. 706, 808 (1999) (citing National League of Cities v. Usery, 426 U.S. 833, 836 (1976) (expressing a short-lived discomfort with extending the FLSA into areas of local control)).

279. 469 U.S. 528 (1985).

280. *See* Alden v. Maine, 527 U.S. 706, 809 (1999); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (reversing the trend hinted at by *National League of Cities*).

281. *See Alden*, 527 U.S. at 809 (discussing *Garcia*, 469 U.S. at 554).

Garcia has not been overruled, and so Congress must still have the power to impose the FLSA on the states, Justice Souter maintained.[282]

However, theory and practice are different in this area, Justice Souter pointed out.[283] The *Seminole Tribe of Florida* decision suggests that federal causes of action like the FLSA's damage provisions are unenforceable in federal court by private suit, and the *Alden* decision makes those provisions unenforceable in state court by a private action as well.[284]

Justice Souter suggested that the federal government could not effectively enforce the rights established by the FLSA by its own litigation divisions.[285] Of course, Justice Souter conceded that within the FLSA, there is an authorization for the Secretary of Labor to file a suit seeking damage.[286] However, he argued that without a large increase in the funding of the various litigation divisions of the federal government, the federal rights guaranteed in the FLSA will go unrealized.[287]

The dissenting Justices concluded from these facts that the Court had decided this case wrongly.[288] They urged that where Congress creates a right, there must be the possibility of redress if that right is violated, for it is not realistic to expect the federal government to hire lawyers to litigate all the actions that may arise.[289] This principle is well established, argued Justice Souter.[290] For example, early in the history of common law the English House of Lords proclaimed: "[i]f an Act of Parliament be made for the benefit of any person, and he is hindered by another of that benefit, by necessary consequence of law he shall have an action; and the current of all the books is so."[291] Despite this traditional

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282. *See id.*

283. *See id.*

284. *See id.*

285. *See id.* at 810 ("[T]he allusion to enforcement of private rights by the National Government is probably not much more than whimsy.").

286. *See id.* (discussing 29 U.S.C. § 216(c) (1994)).

287. *See id.* (explaining and quoting S.REP. No. 93-690, at 27 (1974) in which Congress had determined "that the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming voluntarily").

288. *See id.* at 811.

289. *See id.* at 810-11.

290. *See id.* at 811.

291. *Id.* (quoting Lord Chief Justice Holt in *Ashby v. White*, 87 Eng. Rep. 808, 815 (Q.B. 1702)). Likewise, Chief Justice Marshall asked in *Marbury v. Madison*, "If [one] has a right, and that right has been violated, do the laws of [one's] country afford him a remedy?" *Ashby*, 87 Eng. Rep. at 812 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162, (1803)). Chief Justice Marshall further insisted "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 163). The dissent continued to quote the Chief Justice Marshall: "[i]n Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

understanding, the Court in this decision wrongly asserted, claimed Justice Souter, that lack of a recovery does not invalidate the right.[292]

Finally, Justice Souter warned that the Court's history of swinging back and forth on the enforceability of the FLSA is not over, for this decision is incorrect and will likely be overturned.[293] Justice Souter concluded by observing:

> The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution.[294]

IV. IMPACT

Chief Justice Marshall asked in *Marbury v. Madison*,[295] "if [one] has a right, and that right has been violated, do the laws of [one's] country afford him a remedy?"[296] To Marshall the answer to this question was clearly yes.[297] This conclusion, however, seems far less certain after one reflects upon the recent developments within the doctrine of state sovereign immunity.[298]

A. THE OTHER JUNE 1999 DECISIONS

Alden was only one of a trio of decisions decided by the same five-to-four split in the June of 1999, all of which strengthened the states' position against private action law suits.[299] To understand the impact of *Alden* fully, one must examine these other decisions as well.[300]

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292. *See* Alden v. Maine, 527 U.S. 706, 812-13 (1999).

293. *See id.* at 814.

294. *Id.* Thus the dissent suggests that the *Alden* decision is akin to the Lochner era. *See id.*

295. 5 U.S. (1 Cranch) 137 (1803).

296. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803).

297. *See id.* at 163.

298. *See generally* Alden v. Maine, 527 U.S. 706, 754 (1999) (holding that Congress cannot abrogate a state's immunity in state court by any Article I Powers); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672 (1999) (holding that the Trademark Remedy Clarification Act, which amended the Lanham Act to subject the states to suits for false and misleading advertising, did not validly abrogate state sovereign immunity); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 635-36 (1999) (holding the Patent and Plant Variety Protection Remedy Clarification Act, which amended the patent laws to subject the states to suits for patent infringement, did not validly abrogate state sovereign immunity).

299. *See Alden*, 527 U.S. 706 (1999); *see also College Sav. Bank*, 527 U.S. 666; *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627.

300. *See College Sav. Bank*, 527 U.S. 666; *see also Florida Prepaid Postsecondary Educ.*

1. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*

June 1999 saw the weakening of the Trademark Remedy Clarification Act (TRCA).[301] The TRCA subjects the states to private party lawsuits based on section 43(a) of the Trademark Act of 1946 (Lanham Act) for false and misleading advertising.[302] This assertion of Congressional abrogation was at the heart of *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board.*[303] Two issues were presented to the *College Savings Bank* Court.[304] First, did the TRCA effectively abrogate Florida's immunity?[305] Alternatively, did the state constructively waive its immunity by voluntarily engaging in business activities governed by federal trademark law?[306]

The facts of *College Savings Bank* and *Florida Prepaid Postsecondary* are the same, for the various claims of the two cases arise from the same common nucleus of operative facts.[307] College Savings Bank, a New Jersey bank, has marketed and sold CollegeSure certificates of deposit since 1987.[308] These certificates are designed to cover future costs of college education by investing the up-front investment at a rate that will keep up with increasing tuition rates.[309] The College Savings Bank maintained a patent upon this prepayment plan, and it sued Florida for patent infringement when Florida began administering a similar savings plan.[310] More important for the present discussion, College

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Expense Bd., 527 U.S. 627.

301. *See College Sav. Bank*, 527 U.S. at 668-69 (discussing Trademark Act of 1946, 15 U.S.C. § 1125(a) (1994)).

302. *See id.* Justice Scalia, writing for the majority, explained: "Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), enacted in 1946, created a private right of action against '[a]ny person' who uses false descriptions or makes false representations in commerce." *Id.* at 670. Justice Scalia continued, "[t]he TRCA amends § 43(a) by defining 'any person' to include 'any State,' instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity." *Id.* (discussing § 3(c), 106 Stat. 3568). Further, he explained that:

> The TRCA further amends the Lanham Act to provide that such state entities shall not be immune, under the [E]leventh [A]mendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under this Act, and that remedies shall be available against such state entities "to the same extent as such remedies are available . . . in a suit against 'a non-state entity'."

Id. (discussing 15 U.S.C. § 1122 (1994)).

303. 527 U.S. 666 (1999).

304. *See College Sav. Bank*, 527 U.S. at 669.

305. *See id.*

306. *See id.*

307. *See generally id.*, 527 U.S. 666 (deciding the false advertising component of the trademark case); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (deciding the patent infringement issue of the case).

308. *See College Sav. Bank*, 527 U.S. at 670-71.

309. *See id.*

310. *See id.* at 671. College Savings brought a patent infringement action against the state of

Savings Bank filed an action claiming that Florida violated section 43(a) of the Lanham Act by falsely advertising its tuition savings plan.[311]

The Court first addressed the abrogation issue.[312] Relying on *Seminole Tribe of Florida,* and *Fitzpatrick* the Court reasoned that only the Fourteenth Amendment could provide the basis for the Congressional abrogation of Florida's immunity proported by the TRCA.[313]

Additionally, the Court reiterated that Congress has the authority to pass such legislation only if the legislation remedies or prevents violations of the Fourteenth Amendment.[314] The Court then considered if Florida had interfered with any property right protected by the Amendment.[315] Here the plaintiff urged that its rights were infringed by Florida's alleged false or misleading advertisements.[316] However, the Court rejected the invitation to find that being free from a business competitor's false advertising or being secure in one's business interests were property rights protected by the due process clause.[317] Consequently, the Court reasoned that the TRCA was not enacted to prevent or remedy any right provided by the Fourteenth Amendment, and thus it was not a valid exercise of congressional power insofar as it attempted to abrogate the states' sovereign immunity.[318]

The final question remaining before the Court was whether Florida had waived its immunity from private suits based on the TRCA.[319] It was clear to the Court that Florida had not expressly consented to such suits, and though the bank conceded this point, it insisted that Florida had "constructively" waived its immunity.[320] For this proposition, the bank relied upon *Parden v. Terminal Railway,*[321] which had recognized the doctrine of constructive waiver.[322]

Florida and is the subject of the decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,* 527 U.S. 627 (1999).

311. *See College Sav. Bank,* 527 U.S. at 671.

312. *See id.* at 672.

313. *See id.* at 672-73. *See generally* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (restricting the Congress's power to abrogate a state's immunity to the Fourteenth Amendment alone); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (establishing that Congress could abrogate a state's immunity with a valid exercise of power based upon the Fourteenth Amendment).

314. *See College Sav. Bank,* 527 U.S. at 672. *See generally* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that the Fourteenth Amendment grants only remedial power to Congress).

315. *See College Sav. Bank,* 527 U.S. at 672.

316. *See id.* at 673.

317. *See id.* at 672. The Court noted that had a deprivation of property been found, the Court would "pursue the follow-up [sic] question that *City of Boerne* would otherwise require us to resolve: whether the prophylactic measure taken under purported authority of § 5 (viz., prohibition of States' sovereign-immunity claims, which are not in themselves a violation of the Fourteenth Amendment) was genuinely necessary to prevent violation of the Fourteenth Amendment." *Id.* at 675.

318. *See id.* at 672.

319. *See id.* at 675.

320. *See id.* at 676.

321. 377 U.S. 184 (1964).

322. *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676-77 (1999) (discussing Parden v. Terminal Ry., 377 U.S. 184 (1964)). The *College Savings Bank*

The Parden constructive waiver doctrine asserted that if a state engaged in an activity within an area of federal regulation, the state had constructively subjected itself to the provisions of the regulation.[323] The *College Savings Bank* Court responded by simply overruling the doctrine.[324]

As a result of *College Savings Bank,* the states' immunity from private party suits is even stronger than in the past, for no longer will a state be presumed to have waived its sovereign immunity.[325] Rather, from now on, a state must explicitly consent to suit or the state's immunity must be abrogated by the narrowly construed congressional power to remedy or prevent the violation of a Fourteenth Amendment Rights.[326]

2. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*

The third of the June 23, 1999 decisions also strengthened the states' immunity from congressional abrogation.[327] As discussed above, College Saving Bank sued Florida on multiple theories; however, this case dealt with the alleged patent infringement.[328] College Savings Bank claimed that the Patent and Plant Variety Protection Remedy Clarification Act's amendment of the patent laws expressly abrogated the states' sovereign immunity from patent infringement suits, and thus allowed private party suits.[329] The Court once more undertook the task of determining whether the law was a proper exercise of congressional power.[330] The Court first remarked that only the Fourteenth Amendment granted Congress the power to abrogate a state's immunity.[331] The Court next considered if the Act was appropriate under the Fourteenth Amendment.[332] To this end, the Court employed the *City of Boerne*

Court explained that in *Parden* employees of a state owned railroad were permitted to sue their employer based upon the Federal Employers' Liability Act (FELA) despite the state's asserted immunity. *See id.* at 676.

323. *See id.* at 680. For example, in *Parden,* Alabama was held to have waived its sovereign immunity because it began a railroad after the FELA was passed, and the FELA regulated "[e]very common carrier by railroad . . . engaging in commerce between . . . the several States." *Id.* at 676 (quoting 45 U.S.C. § 51 (1940)).

324. *See id.* at 677 ("Only nine years [after *Parden*], in *Employees of Dept. of Public Health and Welfare of Mo. v. Department of Public Health and Welfare of Mo.*, 411 U.S. 279, (1973), we began to retreat from *Parden*.").

325. *See College Sav. Bank*, 527 U.S. at 678.

326. *See id.* at 679-80.

327. *See generally* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bd., 527 U.S. 627 (1999).

328. *See id.* at 631.

329. *See id.* at 631-33.

330. *See id.* 635.

331. *See id.* at 636 (relying generally on *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which "made clear" that Congress may not abrogate a state sovereign immunity with any Article I power).

332. *See id.* at 637.

analysis.[333] It first identified the particular Fourteenth Amendment right that Congress intended to remedy.[334] It quickly concluded that patents were clearly property rights within the meaning of the Amendment, and thus could be legally infringed upon only after the due process of law.[335] Accordingly, Congress may pass laws to secure these rights, even laws that provide for private party lawsuits, if such an abrogation of the states' immunity is properly conducted.[336]

Having identified a right worth protecting, the Court next considered if the act was in proportion to the wrong being addressed.[337] Here, the Court found Congress overreacted to "a handful of instances of state patent infringement."[338] Further, the Court opined that Congress "barely considered the availability of state remedies for patent infringement and hence whether the state's conduct might have amounted to a constitutional violation under the Fourteenth Amendment."[339] That is to say, the infringement of a patent by a state is only unconstitutional if the state fails to afford the injured party due process of law.[340]

Thus, the Court concluded that the Patent and Plant Variety Protection Remedy Act was unconstitutionally disproportionate to the problem of state infringement upon patents.[341] Therefore, the Act could not be upheld as an exercise of valid abrogation power to enforce the Fourteenth Amendment's Due Process Clause.[342] This decision may suggest that any attempt to use the Fourteenth Amendment as an expansive grant of power is barred, for in the case at hand, the Court was unwilling to defer to congressional findings of fact, and rather independently considered if congressional findings supported the law in question.[343]

In light of recent and historic development, the only method of abrogating state immunity is through the Fourteenth Amendment.[344] This power is narrowed in three ways.[345] First, *City of Boerne v. Flores* demands that any act which proports to abrogate a state's immunity

333. *See id.* at 639-40.
334. *See id.*
335. *See id.* at 642.
336. *See id.* at 642-43.
337. *See id.* at 637.
338. *Id.* at 645.
339. *Id.* at 643.
340. *See id.*
341. *See id.* at 646-47.
342. *See id.*
343. *See generally id.* at 637-48.
344. *See* Alden v. Maine, 527 U.S. 706, 756 (1999). *See generally* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).
345. *See generally* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 637 (1999); *Seminole Tribe of Florida*, 517 U.S. 44; City of Boerne v. Flores, 521 U.S. 507 (1997).

must be a remedial and proportional measure.[346] Second, *Seminole Tribe of Florida v. Florida* reiterates that clear congressional intent must be manifested within the act itself.[347] Lastly, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, implies that Congress's belief that a measure is remedial and proportional will not be deferred to by the Court, but rather independently scrutinized by the United States Supreme Court.[348]

B. *KIMEL V. FLORIDA BOARD OF REGENTS*

Another recent decision of the Court also suggests the full impact of the recent developments in the sovereign immunity doctrine on the American political and legal landscape.[349] In *Kimel v. Florida Board of Regents*,[350] Congress's attempt to abrogate the states' sovereign immunity with the Age Discrimination in Employment Act of 1967 (ADEA) was held to be unconstitutional.[351]

The *Kimel* Court observed that the ADEA made it unlawful "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[352] The Court discussed the problematic language of the Act, which asserted that "any person aggrieved by an employer's violation of the Act 'may bring a civil action in any court of competent jurisdiction' for legal or equitable relief."[353] Defendants in the case argued that this was an unconstitutional attempt to abrogate the immunity they enjoyed as states, and thus filed a motion to dismiss.[354]

To determine whether or not the ADEA was a valid exercise of congressional power, the Court applied the now familiar test.[355] Such an attempted abrogation must contain a clear statement of an intent to abrogate a state's immunity and such an assertion must be based upon a power that was granted to Congress by the Constitution.[356] The Court quickly found the first of these hurdles to be no hurdle at all, for clearly

346. *See generally City of Boerne*, 521 U.S. at 519-20.
347. *See generally Seminole Tribe of Florida*, 517 U.S. at 55.
348. *See generally Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 637-48.
349. *See generally* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000).
350. 120 S. Ct. 631 (2000).
351. *See generally* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 650 (2000).
352. *Id.* (citing 29 U.S.C. § 623(a)(1) (1994)).
353. *Id.* at 637.
354. *See id.* at 639.
355. *See id.* at 640.
356. *See id.* at 640, 642.

the ADEA contained evidence of Congress's intent to abrogate the states' immunity.[357]

Conversely, the second hurdle the court considered was insurmountable by the ADEA.[358] If the ADEA were to abrogate a state's immunity, it would have to be based upon the power vested in Congress by section five of the Fourteenth Amendment.[359] That is, it would need to remedy, or prevent, an infringement of a substantive right guaranteed by that Amendment.[360] Further, any such act must be "congruen[t] and proportion[al]" to the discrimination that is being redressed.[361]

Applying the same "congruence and proportionality" test, the Court concluded "that the ADEA is not 'appropriate legislation' under Section Five of the Fourteenth Amendment [because] the substantive requirements [that] the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[362] The Court reasoned that to make the states answerable for any discrimination based on age goes beyond simply enforcing the rights granted by the Fourteenth Amendment.[363] In fact, "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[364] Thus, Congress went beyond its authority to enforce the rights protected by the Fourteenth Amendment and in essence invented new rights.[365] And, regardless of the value or importance of these rights, Congress cannot enforce them

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357. *See id.* at 640. The Court observed that "[r]ead as a whole, the plain language of [many provisions of the ADEA] clearly demonstrates Congress's intent to subject the States to suit for money damages at the hands of individual employees." *Id.*

358. *See id.* at 645 (concluding that the ADEA fails to validly abrogate the State's sovereign immunity).

359. *See id.* at 644.

360. *See id.* at 644 (relying on both City of Boerne v. Flores, 521 U.S. 507 (1997) and Katzenbach v. Morgan, 384 U.S. 641 (1966), for the proposition that the Congress can use the Fourteenth Amendment to prevent as well as correct violations of the Amendment).

361. *Id.* at 644-45 (discussing *City of Boerne*, 521 U.S. 507, which produced the "congruence and proportionality" test).

362. *Id.* at 645.

363. *See id.* at 647.

364. *Id.* at 646. The Court found ample support for this position in its Equal Protection jurisprudence. *See id.* at 646-47. Thrice the Court has heard claims of age discrimination, and each time it has found the disputed action constitutional. *See id.* at 646 (citing Gregory v. Ashcroft, 501 U.S. 452 (1991); Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976)). This is true because in each of these cases the Court asked only whether the contested regulation was merely rationally related to the advancement of a legitimate government goal. *See id.* Age, unlike color, for example, is not a suspect classification because being old, unlike being of color, "does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it." *See id.* at 645 (citing *Murgia*, 427 U.S. at 313-14).

365. *See id.* at 646. "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." *Id.*

with its Fourteenth Amendment, section five power to authorize private actions against unconsenting states.[366] It is clear from the above discussion that the doctrine of states' sovereign immunity has been strengthened considerably by the Rehnquist Court, especially by the June 23rd decisions. [367]

C. IMPACT ON NORTH DAKOTA

In *Bulman v. Hulstrand Construction Co.*,[368] the Supreme Court of North Dakota in 1994, judicially abrogated the state's immunity.[369] The North Dakota Supreme Court concluded that the doctrine of state sovereign immunity did not have a basis in the North Dakota State Constitution, and was instead just common law which the state supreme court had the power to affirm or destroy.[370] The North Dakota Supreme Court then used this power to abrogate the state's sovereign immunity.[371] However, if North Dakota were to assert, by constitutional amendment or legislation, a sovereign immunity defense, it could be immune from all suits prosecuted by private citizens and based upon any federal law, premised on any source of power other than the Fourteenth Amendment.[372] It may, indeed, be difficult for the State of North Dakota to resist the temptation to avail itself of the shield of sovereign immunity, especially as she continues to watch her sister states free themselves of one federal cause of action after another.

V. CONCLUSION

The Rehnquist Court seems committed to protecting state governments from federal encroachment.[373] It has allowed states to assert immunity, even when such an assertion precludes completely a private

366. *See id.* at 650 (finding the abrogation invalid).

367. *See generally* Alden v. Maine, 527 U.S. 706 (1999) (holding a state's immunity in state court cannot be abrogated by any Article I power); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding a state's immunity in federal court may not be abrogated with any Article I power).

368. 521 N.W.2d 632 (N.D. 1994).

369. *See generally* Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632 (N.D. 1994) (explaining that the state could not avail itself of a power not granted by the state constitution).

370. *See id.* at 636 (explaining that past assertions that Article I, section 9 of the State Constitution, had provided a bases for an assertion of sovereign immunity were mistaken).

371. *See id.* at 639.

372. *See generally* Alden v. Maine, 527 U.S. 706 (1999).

373. *See generally id.*, College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding a state's immunity may not be abrogated by any Article I power).

action lawsuit to redress a wrong.[374] Already various states have freed themselves of private actions based on the Indian Gaming Act,[375] Fair Labors Standards Act,[376] the Trademark laws,[377] and most recently the Age Discrimination in Employment Act.[378] We are thus left with the question, "if [one] has a right, and that right has been violated, do the laws of [one's] country afford him a remedy?"[379]

*Forde Owens Fairchild**

374. *See generally Alden*, 527 U.S. 706 (disallowing the plaintiff from suing on a private action in state court, even when it's the court of last resort).

375. *See generally Seminole Tribe of Florida*, 517 U.S. 44.

376. *See generally Alden*, 527 U.S. 706.

377. *See generally College Sav. Bank*, 527 U.S. 666; *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627.

378. *See generally* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000).

379. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803) (quoting Chief Justice Marshall)). Remember that there are still ways of ensuring that the wishes of Congress are given sway by the states, for example *South Dakota v. Dole* recognizes Congresses power over the purse as such a means of influence. *See generally* South Dakota v. Dole, 483 U.S. 203 (1987). Additionally, the *Ex parte Young* exception allows the States to be held to federal laws by private actions against state officers. *See generally Ex parte* Young, 209 U.S. 123 (1908). Further the federal government can sue the states directly. *See Seminole Tribe of Florida*, 517 U.S. at 71 n.14 (reminding us that "the Federal Government can bring suit in federal court against a State").

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